No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA, INC. D/B/A ARGUS MEDIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* DETENTION WATCH NETWORK, HUMAN RIGHTS DEFENSE CENTER AND PRISON POLICY INITIATIVE

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QUESTION PRESENTED

In an action brought under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, where the defendant federal agency has waived appeal of a district court's disclosure order and therefore is bound to release the information in its possession, is there a "Case" or "Controversy" under Article III of the Constitution when a private intervenor appeals the order that directs the Government to disclose the information to the public?

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are organizations that depend upon the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, ("FOIA") to investigate, publish, and hold the Government accountable for its detention and prison policies, an area in which the Government increasingly works with private entities and contractors to implement government functions. *Amici* are concerned that a decision by the Court to exercise jurisdiction in this case will permit private entities to assert unfounded control over government transparency decisions, thereby undermining their work and the purpose of FOIA.

Detention Watch Network

Detention Watch Network ("DWN") is a national coalition of organizations and individuals working to expose and challenge the injustices of the U.S. immigration detention and deportation system and advocate for profound change that promotes the rights and dignity of all persons. DWN was founded in 1997 in response to the explosive growth of the immigration detention and deportation system in the United States. Today, DWN is the only national network that focuses exclusively on immigration detention and deportation

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

issues and is known as a critical national advocate for just policies that promote an eventual end to immigration detention. As a member-led network, DWN unites diverse constituencies to advance the civil and human rights of those impacted by the immigration detention and deportation system through dissemination of information, collective advocacy, public education, communications, and field-and-network-building. Using data and records obtained through Freedom of Information Act requests and litigation, DWN researches and publishes original reports regarding detention and immigration policy. DWN was the Respondent in *Geo Grp., Inc., v. Det. Watch Network, et al.*, 138 S. Ct. 317, No. 17–64 (Oct. 10, 2017), in which this Court denied *certiorari* to a private contractor seeking to appeal a Freedom of Information Act disclosure order after the federal agency declined to appeal.

Human Rights Defense Center

The Human Rights Defense Center ("HRDC") is a nonprofit charitable corporation headquartered in Florida that advocates in furtherance of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC's advocacy efforts include publishing two monthly publications, *Prison Legal News*, which covers national and international news and litigation concerning prisons and jails, as well as *Criminal Legal News*, which is focused on criminal law and procedure and policing issues. HRDC also publishes and distributes self-help reference books for prisoners and engages in state and federal court litigation on prisoner rights issues, including wrongful death, class actions, Section 1983 civil

rights litigation concerning the First Amendment rights of prisoners and their correspondents. It is a leader in litigating cases involving government collaboration with the private prison industry, including numerous actions under the Freedom of Information Act.

Prison Policy Initiative

The Prison Policy Initiative ("PPI") is a non-profit organization that challenges over-criminalization and mass incarceration through research, advocacy, and organizing. Founded in 2001, the PPI produces policy reports, engages in public campaigns, and disseminates advocacy materials documenting the United States' excessive and unequal use of punishment and institutional control and the consequent harms to individuals, communities and national well-being. PPI's efforts include campaigns to bring fairness to the prison and jail phone and videoconferencing industries and annual publication of *Mass Incarceration: The Whole Pie*, assembling data on individuals incarcerated in prisons, jails and detention facilities across the United States. PPI's work, which includes extensive research on government collaboration with private contractors, often relies on local and federal open records requests to document exploitation of incarcerated people and their families.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, ("FOIA") provides broad access to government information to fulfill its purpose of opening federal agencies to the light of public scrutiny and holding the

governors accountable to the governed. There is no "Case" or "Controversy" based upon FOIA without a party seeking to compel disclosure of government information and a government agency defending a statutory right to withhold such information from the public. Here, the latter is fatally missing.

The United States Department of Agriculture, the Defendant Agency that lost its argument in the district court to withhold information pursuant to 5 U.S.C. § 552 (b)(4) ("Exemption 4") and then declined to appeal, is not the petitioner before this Court. Instead, the petitioner is a private business association which intervened post-judgment to appeal the district court's order.

The absence of the Government as an appellant eliminated federal court jurisdiction over Petitioner's unilateral appeal to the Eighth Circuit, and there is likewise no "Case" or "Controversy" before this Court. The Defendant Agency, the only party in interest that can invoke and litigate FOIA exemptions, waived its right to appeal and is thus bound to disclose the requested information. The Court has no jurisdiction to relieve a non-appealing party, the Government, of this adverse judgment.

In this context, Article III's standing requirements are also a barrier to jurisdiction. As a private intervenor not bound by the judgment below, Petitioner lacks both a legally cognizable interest and a redressable injury. Indeed, redress is not only unlikely, it is foreclosed: the Court cannot relieve a non-appealing party of a binding judgment. But even if the Government had appealed, the Court still could not order the relief that Petitioner

seeks. FOIA is exclusively a disclosure statute and the federal courts cannot direct the Government to withhold information from the public.

Accordingly, an unprecedented ruling finding jurisdiction and accepting Petitioner's standing would do grave violence to FOIA. It would allow private intervenors to exercise a veto over government disclosure decisions, thereby undermining FOIA's efficacy as a tool for ensuring government transparency, particularly when government agencies partner or contract with private entities to implement government functions.

Accepting jurisdiction would also have far-reaching implications for cases involving private intervenors outside of the FOIA context. Allowing third parties to relieve the Government of binding judgments that the Government does not contest would invite intervenors to disrupt government decision-making outside of appropriate litigation channels, even when the third parties have no cognizable rights at issue. The statutory and, most significantly, constitutional requirements of jurisdiction serve as an indispensable check on such results, preserving the constitutional structure of separation of powers by restraining the Court from acting only upon actual "Cases" and "Controversies." For all of these reasons, the Court should vacate the decision of the Court of Appeals and remand for dismissal.

ARGUMENT

I. ARTICLE III'S CASE OR CONTROVERSY REQUIREMENT PRECLUDES PRIVATE PARTY INTERVENORS FROM UNILATERALLY APPEALING FOIA JUDGMENTS THAT THE GOVERNMENT HAS NOT APPEALED.

A. The Court has no jurisdiction to relieve a non-appealing party of an adverse judgment.

The Court lacks jurisdiction under Article III to address a private intervenor's appeal of a judgment under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, which the Government has not appealed. Article III of the Constitution restricts the power of the federal courts to deciding "actual 'Cases' or 'Controversies.'" *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (quoting U.S. Const. art. III, § 2). Just as Article III requires standing to sue, it likewise demands that any party seeking to "defend on appeal in the place of an original defendant" establish a "Case" or "Controversy." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64–65 (1997); *see also Diamond v. Charles*, 476 U.S. 54, 64–65, 68 (1986). Here, Petitioner cannot clear these jurisdictional hurdles.

Specifically, the Government's "failure to invoke" the jurisdiction of the Court "leaves the Court without a 'case' or 'controversy'" between the FOIA requesters and the Government. *See Diamond*, 476 U.S. at 63–64. "[A]s a party below, the [Petitioner] remains a party here...[, b]ut status as a 'party' does not equate with status as an appellant." *Diamond*, 476 U.S. at 63 (citing Rule 10.4). "To

appear before the Court as an appellant, a party must file a notice of appeal, *the statutory prerequisite to invoking this Court's jurisdiction. See* 28 U.S.C. § 2101(c)." *Id.* (emphasis added). Here, the Government declined to appeal after the district court ruled in favor of the FOIA requester, and thus was not an appellant in the Court of Appeals as well. *Argus Leader Media v. U.S. Dep't of Agric.*, 889 F.3d 914, 916 (8th 2018). Petitioner "intervened and filed this appeal" post-judgment. *Id.*

The Government is thus bound by the lower court's judgment because it never invoked appellate jurisdiction, *see* Fed. Rule App. Proc. 3; 28 U.S.C. § 2101(c), and a private intervenor cannot relieve it of that obligation or the consequences of the judgment. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314–15 (1988) (holding that courts of appeals may not "exercise jurisdiction over parties not named in the notice of appeal"); *Federated Dep't. Stores, Inc. v. Moitie*, 452 U.S. 394, 398–99 (1981) (rejecting claim that "non-appealing parties may benefit from a reversal when their position is closely interwoven with that of appealing parties"); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (finding the United States bound by a judgment where it failed to "avail itself of the remedy it had to preserve its rights").

The Court has held that a party cannot be relieved of the consequences of failing to appeal even where it produced "harsh" results. *Torres*, 487 U.S. at 315, 318 (finding a jurisdictional problem due to the inadvertent omission of a litigant's name from a notice of appeal due to clerical error, notwithstanding that the notice included

the designation *et. al*).[2] In contrast, there is nothing harsh about holding the Government to the judgment below where it chose not to appeal. In the absence of another party subject to the judgment who can properly appeal, here the jurisdictional defect is fatal.

The Petitioner attempts to overcome the Government's failure to appeal by effectively stepping into the shoes of the Defendant Agency and acting as if it is the Government. It cannot do so.

First, under FOIA, the Government has sole authority to determine whether to withhold information pursuant to an exemption, subject to judicial review, or to release it to the public. *Chrysler Corp. v. Brown*, 441 U.S. 281, 291–93 (1979) ("FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information."). FOIA "'balances and protects all interests'" while "'plac[ing] emphasis on the fullest responsible disclosure'" in order to promote the public interest in democratic accountability. *EPA v. Mink*, 410 U.S. 73, 80 (1973) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). Allowing private parties "to intervene and control" FOIA litigation frustrates this statutory mandate. *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 149 (1967) (reasoning that private intervenors cannot dictate public antitrust litigation because determining "what the public interest requires is the statutory duty and responsibility of the Government").

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2. In *Torres*, the Court reasoned that Federal Rule of Appellate Procedure 3(c) required the notice to "specify the party or parties taking the appeal" and without that information, Torres had not appealed. *Id.* at 315, 318.

Second, "'[a] litigant must assert his or her own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties.'" *Hollingsworth*, 570 U.S. at 708 (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). Accordingly, the Court has consistently rejected intervenors' attempts to invoke the legal rights of an absent party in interest as the basis for an appeal. *Arizonans for Official English*, 520 U.S. at 64–65; *Diamond*, 476 U.S. at 64–65. Unless the third party establishes a "judicially cognizable interest" in his "own" right, *Hollingsworth*, 570 U.S. at 708, an intervenor "cannot step into the shoes of the original party[,]" *Arizonans for Official English*, 520 U.S. at 65.

This is particularly true when the non-appealing party is the Government. *Hollingsworth*, 570 U.S. at 715 (stating that this Court has never "upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to"). The principle underlying those decisions extends beyond the defense of state legislation: the Court has no jurisdiction to hear a case by a private party wishing to relieve the Government of an adverse judgment, which the Government itself does not appeal.

For example, in *Karcher v. May*, 484 U.S. 72, 75, 81–82, (1987), two state legislators intervened in a suit against the State to defend the constitutionality of a New Jersey law after the state's attorney general declined to do so. This Court held that they could not relieve the State of an adverse judgment once they were no longer presiding officers of the New Jersey Legislature. *Id.* at 78. The Court recognized that the intervenors "could vindicate" the State's interest in federal court so long as

they held positions as representatives of the New Jersey Legislature. *Hollingsworth*, 570 U.S. at 709–10 (discussing *Karcher*, 484 U.S. at 81). But once the intervenors "lost their positions as Speaker and President" in that body "they lack[ed] authority to pursue th[e] appeal" as private persons. *Id.* at 710 (citing *Karcher*, 484 U.S. at 81).

Karcher emphasized that the Court has "consistently applied the general rule that one who is not a party or has not been treated *as a party to a judgment* has no right to appeal therefrom." 484 U.S. at 77 (citing *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917); *Ex parte Leaf Tobacco Board of Trade*, 222 U.S. 578, 581 (1911); *Ex parte Cockcroft*, 104 U.S. (14 Otto) 578, 579 (1882); *Ex parte Cutting*, 94 U.S. (4 Otto) 14, 20–21 (1877)). Here, that rule is dispositive of jurisdiction. The Intervenor-Petitioner was not a party to the judgment; it intervened and appealed post-judgment.

The Court reached a similar conclusion in *Diamond v. Charles*, where it noted that "[a]lthough intervenors are considered parties entitled, among other things, to seek review by this Court, an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III[.]" *Diamond*, 476 U.S. at 68 (internal citation omitted). There, the absent party in interest, the State of Illinois, had declined to defend the constitutionality of the Illinois Abortion Law on appeal. *Id.* at 61. Nevertheless, it proffered a "letter of interest" to the Court that its position regarding the law's constitutionality was identical to its position before the lower courts and "essentially coterminous" with the position of the intervenor on appeal. *Id.*

The Court held that the private party could not appeal in place of the government. *Id.* at 63–64. It reasoned that Illinois's failure to invoke the Court's jurisdiction left "the Court without a 'case' or 'controversy' between appellees and the State of Illinois." *Id.* at 64.

These precedents make clear that there is no Article III "Case" or "Controversy" when a private party attempts to vindicate its interests by usurping the Government's exclusive authority to appeal or accede to judgments against it. In fact, the Court found jurisdiction lacking in these cases notwithstanding the aggrieved intervenors' asserted interests and injuries. *See Karcher*, 484 U.S. at 78; *Diamond*, 476 U.S. at 64–67.

Accordingly, the Government's failure to appeal the judgment at issue here extinguished the FOIA dispute and at that point the case "lost the essential elements of a justiciable controversy[.]" *Arizonans for Official English*, 520 U.S. at 48; *Karcher*, 484 U.S. at 83 ("The controversy ended when the losing party—the New Jersey Legislature—declined to pursue its appeal."). The Defendant Agency is the only entity bound by the district court's disclosure order and the only entity that can seek relief from that judgment. The case should "not have been retained for adjudication on the merits by the Court of Appeals" and this Court should vacate its decision and remand for dismissal. *See id.*[3]

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3. Indeed, "[e]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,'" even if the parties conceded it. *Arizonans for Official English*, 520 U.S. at 73 (quoting *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986)). Where "the record discloses that the lower

B. Private intervenors who appeal FOIA disclosure orders accepted by the Government lack the "legally cognizable interest" and redressable injury required for Article III standing.

Private intervenors have no independent standing to appeal a judgment directing the Government to disclose information to the public when the Government declines to appeal. Standing is an essential component of an Article III "Case" or "Controversy" and "'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Hollingsworth*, 570 U.S. at 705 (quoting *Arizonans for Official English*, 520 U.S. at 64).

As the Court recently emphasized in *Town of Chester, N.Y. v. Laroe Estates, Inc.*, when there are multiple litigants, "[a]t least one plaintiff must have standing to seek each form of relief requested" and "an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." 137 S. Ct. 1645, 1651 (2017); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352

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court was without jurisdiction this court will notice the defect" even if the parties have not asserted the jurisdictional claim. *Id.* at 73 (concluding that the Court had authority to "make such disposition of the whole case as justice may require" where the Court of Appeals "refused to stop the adjudication" once the court lost jurisdiction); *see also United States v. Corrick*, 298 U.S. 435, 440 (1936) (recognizing jurisdiction "merely for the purpose of correcting the error of the lower court in entertaining the suit"); *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 72–73 (1983) (per curiam) (vacating Court of Appeals' judgment where lower court ruled on the merits notwithstanding that the case was moot).

(2006). Here, where the Government has foregone an appeal, the Intervenor-Petitioner cannot independently establish Article III standing to support the relief it seeks: reversal of a judgment binding the Government. *See Hollingsworth*, 570 U.S. at 709; *Arizonans for Official English*, 520 U.S. at 48.

1. Private Parties have no "legally protected interests" under FOIA

Private party intervenors have no legally protected interests that give rise to an "injury in fact" when the Government declines to appeal a FOIA judgment. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo v. Robbins, Inc.*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted)). In *Chrysler Corp. v. Brown*, this Court held that private parties have no legally protected interests under FOIA, and a court has no power to order the government to keep its documents secret. 441 U.S. 281, 291–93 (1979) (citing 5 U.S.C. § 552(a)(4)(B) (providing district courts with "jurisdiction to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant" but making no provision for judicially ordered secrecy).

In *Chrysler*, the corporate plaintiff, a contractor with the Department of Defense ("DOD"), sought to enjoin DOD's release of affirmative action plans and equal employment opportunity reports, claiming they were "confidential" pursuant to FOIA Exemption 4. *Id.*

at 286–88, 291. The Court rejected Chrysler's attempt to bar disclosure, finding it contrary to FOIA's "language, logic" and "history." *Id.* at 291–92.[4]

It reasoned that while FOIA's exemptions, and "Exemption 4 in particular, reflect a sensitivity to the privacy interests of private individuals and nongovernmental entities" *id.* at 291, the statute protects the interests of private parties "only to the extent that this interest is endorsed" by the government. *Id.* at 292–93 ("[T]he congressional concern was with the agency's need or preference for confidentiality."). The Court therefore concluded that FOIA does not grant a private right of action to parties seeking to block government disclosures and district courts lack jurisdiction to compel the withholding of government information. *Id.*

For over forty years following *Chrysler*, the federal courts have recognized that FOIA does not provide private parties with any "legally protected interests" that permit them to compel the withholding of information from the public. *See, e.g., Acumenics Research & Tech. v. Dep't of Justice*, 843 F.2d 800, 804 (4th Cir. 1988) ("[A] private party seeking to block an agency's disclosure of

4. SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 6 (July 4, 1966), available at http://www.llsdc.org/assets/sourcebook/foia-lh.pdf (FOIA's exemptions "were not intended by Congress to be used either to prohibit disclosure of information or to justify automatic withholding of information"). Thus, private entities, and even the courts, have no grounds under the FOIA to second-guess statutorily authorized government decisions that favor transparency.

information under FOIA has no private right of action[.]"); *In re Providence Journal Co.*, 820 F.2d 1342, 1349 (1st Cir. 1986) ("FOIA does not authorize an injunction against disclosure."); *NOW v. Soc. Sec. Admin. of Dep't of Health and Human Servs.*, 736 F.2d 727, 744–45 (D.C. Cir. 1984) ("[T]he FOIA right of action extends only to those who request disclosure."); *Stoianoff v. Comm'r of Motor Vehicles*, 107 F. Supp. 2d 439, 444 (S.D.NY. 2000) ("[T]here is no private right of action to enjoin agency disclosures of information under FOIA.").

This universally recognized inability of private parties to compel the Government to withhold information forms not only a statutory barrier to suit, but also goes to the heart of Article III's jurisdictional requirements. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014) (suggesting that the absence of even a plausible "cause of action"[5] could "implicate subject-matter jurisdiction") (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998), holding that Article III standing requirements were not met because the "specific items of relief sought, and none that [Court could] envision as 'appropriate'" would redress the injuries claimed by the party, *id.* at 105–06). For the reasons addressed in Part IA, *supra*, there is no plausible jurisdictional basis for the Court to reverse a judgment that does not affect the legal rights of the intervenor, and which the Government has not appealed.

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5. While the Petitioner may have had a cause of action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq.*, *see* Part IIA *infra*, it has never brought such a claim, and relief under the APA is not before the Court. There is no standing to pursue relief in this case when the Government is not an "appellee" or "appellant" before this Court.

Moreover, *amici* cannot find a single case, and the parties have not cited one, prior to the Eighth Circuit's decision below in May 2018, where an appellate court permitted a private intervenor, acting alone, to appeal a FOIA decision ordering the Government to disclose information. In fact, only seven months before the Eighth Circuit's decision, this Court denied *certiorari* in another Exemption 4 FOIA dispute where a private intervenor unsuccessfully attempted to do just that. *See Geo Grp., Inc., v. Det. Watch Network, et al.*, 138 S. Ct. 317, No. 17–64 (Oct. 10, 2017).

In that case, brought by *Amicus* Detention Watch Network, the United States Court of Appeals for the Second Circuit granted its motion to dismiss the intervenors' appeal for lack of standing where the Government had failed to appeal. *Det. Watch Network v. Corr. Corp. of Am.*, No. 16-3141 (L), 2017 WL 4122728, at *1 (Feb. 8, 2017), *cert denied* 138 S. Ct. 317 (2017). The lack of any prior case recognizing the standing of a private intervenor to appeal a FOIA disclosure order in the place of the Government underscores the weakness of the Article III standing claimed here.

The Solicitor General acknowledges the unusual posture of this case but draws the wrong conclusion from its aberration. It claims that the appeal of a FOIA judgment "in which the government did not participate on appeal, is extraordinarily atypical for a FOIA action." U.S. Br. at 32. That is true insofar as the demands of Article III should have prevented the private intervenor from pursuing a unilateral appeal before the Court of Appeals. But neither the jurisdictional mistake below, nor the Government's changing views and representation of

whether it will exercise its statutorily conferred discretion to disclose, *see* Respondents' Br. at 32, provides a sound justification for a one-time recognition of standing. The Government's decision not to appeal is dispositive; there is no jurisdiction.

Moreover, *Amici* caution that the inclination on the part of private interests to exercise unfounded oversight over FOIA is not aberrational, as demonstrated by private intervenors' unsuccessful efforts in *Detention Watch Network*, 138 S. Ct. 317, to seek this Court's review last term. Indeed, private intervenors have significant incentives to attempt unfounded oversight of FOIA decisions. Once the Government has agreed to release its information, private parties may seek to litigate merely to delay disclosure of government information they may prefer be kept secret even when the Government has no basis to withhold.

The Solicitor General also submits that because a private party opposing disclosure is "'unable to plead its own FOIA-based 'claim for relief' or a FOIA-related 'defense[] to [any] claim asserted against it,'" a private actor "opposing disclosure could not properly intervene as of right in a FOIA action under Federal Rule of Civil Procedure Rule 24." U.S. Br. at 32 (citing Fed. R. Civ. P. 8(a) and (b)(1)(A)). Putting aside the standards that should apply to Rule 24, which is not before the Court,[6]

6. *Amici* submit that intervention was inappropriately granted here under Rule 24. Both the record below and the proceedings in *Det. Watch Network*, No. 16-3141 (L), 2017 WL 4122728, at * 1, suggest that district courts may follow a more lenient approach to Rule 24 than that urged by the Solicitor General, allowing intervention even where a party seeks to compel

the Solicitor General's position does not reconcile how an insufficient interest for purpose of intervention should nonetheless satisfy the "legally protected interest" demanded by Article III.

Indeed, numerous courts have recognized that even where a party has a valid "interest" to justify intervention as of right below, that cannot, of its own force, establish the constitutional requirements of Article III, particularly "in the absence of the party on whose side intervention was permitted[.]" *Diamond*, 476 U.S. at 68; *see also id.* at 69 (intervenors' interests below were "plainly . . . insufficient to confer standing" on appeal); *Town of Chester*, 137 S. Ct. at 1651 ("an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing").

As the many decisions that have followed *Chrysler* have necessarily recognized, private intervenors have no "legally protected interests" at stake in a now-resolved FOIA dispute. Just as intervenors could not sue to block an agency's disclosure through FOIA directly under *Chrysler*, they may not usurp the Government's FOIA authority and appeal a FOIA judgment in place of the Government to achieve that result.

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withholding and has not asserted an APA claim. As a practical matter then, Rule 24 is not a consistent gatekeeper against third party attempts to assert unfounded control over FOIA and, in any event, is no answer to the jurisdictional question before the Court.

2. This Court cannot order relief that would redress the private intervenor's purported injury.

Petitioner's purported injury is not redressable because the relief the private intervenor seeks, a judicial order directing or permitting the Government to withhold information, cannot be issued in this case. That is true first and foremost for the reasons stated in Part IA, *supra*: An intervenor cannot relieve the Government of a judgment it has not appealed. But redressability is not "likely" for other reasons as well. FOIA is "exclusively a disclosure statute," and the federal courts have no "authority to bar disclosure" under the statute. *Chrysler*, 441 U.S. at 292.

First, the constitutional requirement of "likely" redress, *Lujan*, 504 U.S. at 561, cannot be met in this case even if a favorable ruling for the petitioner would merely *permit* the Government to withhold the disputed information should they choose to do so. Here, redress is not only speculative, it is foreclosed. The Government, by waiving its right to appeal, abandoned any claim it had to withhold the documents under Exemptions 4 of FOIA. *Federated Dep't Stores, Inc.*, 452 U.S. at 398 (rejecting claim that "non-appealing parties may benefit from a reversal when their position is closely interwoven with that of appealing parties"). That decision is irreversible; the Government cannot now withhold documents pursuant to Exemption 4 because it has not preserved its right to do so.

The Government's assurances that it would not release information pending the Petitioner's appeal (U.S. Br. at 34) and its compliance with court-ordered stays (U.S. Br. at 9) cannot cure this failure to appeal. It is bound to

disclose, and the Court lacks jurisdiction to reverse the judgment and permit the Government to withhold the contested information.

Second, as the Solicitor General acknowledges, this appeal "could not result in any limitation on the agency's discretion to disclose its own records[.]" U.S. Br. at 32 (stating FOIA "prohibits only the improper 'withholding [of] agency records' and does 'not limit an agency's discretion to disclose information'") (quoting *Chrysler*, 441 U.S. at 292). This means that Petitioner's claimed injury cannot "be redressed by a favorable decision" by this Court on the scope of Exemption 4. *Lujan*, 504 U.S. at 561. Indeed, redress cannot depend upon "the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013) (noting the Court's "reluct[ance] to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment").

The United States' reliance on *ASARCO*, 490 U.S. at 618-19, is misplaced. That case involved an appeal of an Arizona Supreme Court ruling that invalidated a state law limiting mining leases and sales. *Id.* at 610, 618. The state court ruling challenged by the intervenors in ASARCO was an "adjudication" of the intervenor's "legal rights." *Id.* at 618. Indeed, the ASARCO intervenors held leases "granted under the state law the Arizona Supreme Court invalidated." *Id.* Thus, the Court found a redressable injury because a reversal of the declaratory judgment would mean the intervenors' leases were no longer invalid.

Id. The same is not true here where intervenors have no "rights" implicated by FOIA, *see Chrysler*, 441 U.S. at 292, and none were adjudicated in the FOIA judgment, which binds only the Government.

In sum, Petitioner's purported injury is not redressable because the relief the private intervenor seeks, a judicial order directing or permitting the Government to withhold information, cannot be issued in this case. An intervenor cannot relieve the Government of a judgment it has not appealed, and even if it could, redressability is still not "likely." The Government has discretion under FOIA to decide to release its information to the public, notwithstanding available exemptions, and the Court has no authority under FOIA to order the Defendant Agency to withhold information and grant the only relief that would redress Petitioner's claim.

II. ACCEPTING JURISDICTION OVER INTERVENOR'S APPEAL IN THE ABSENCE OF THE GOVERNMENT PARTY IN INTEREST WOULD UNDERMINE CONGRESSIONAL INTENT.

A. Petitioner cannot challenge government disclosures under FOIA outside of the Administrative Procedure Act.

In seeking to stop the Government from disclosing the requested information in this case, Petitioner failed to utilize the only available means of challenging the government's decision to disclose information requested under FOIA to the public: the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702 *et seq.* In declaring forty

years ago in *Chrysler* that there is no private right of action under FOIA, the Court recognized that the only action available to private parties to challenge government disclosure decisions is a "Reverse-FOIA" suit pursuant to the APA. *Chrysler*, 441 U.S. at 317. (finding that Petitioner could challenge disclosure of information through "Section 10(a) of the APA, [which] provides that '[a] person suffering legal wrong because of agency action, or adversely aggrieved or affected by agency action..., is entitled to judicial review thereof'").

Here, Petitioner avoided this avenue, notwithstanding the numerous cases proceeding under an APA analysis in the years before and since *Chrysler Corp. See, e.g., Jurewicz v. U.S. Dep't of Agric.*, 741 F.3d 1326, 1329 (D.C. Cir. 2014) (affirming grant of summary judgment to defendant agency in reverse-FOIA claim brought by private party to challenge disclosure under § 706(2) of the APA and finding that defendant agency's decision to disclose was not "arbitrary and capricious"); *McDonnell Douglas v. U.S. Dep't of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004) (in reverse-FOIA claim brought by private contractor under § 706 (2) of the APA, finding agency decision to disclose arbitrary and capricious and contrary to law); *Planned Parenthood of the Great NW & the Hawaiian Islands, Inc., v. Azar*, 352 F. Supp. 3d 1057 (W.D. Wa. 2018) (same); *General Electric v. Dep't of the Air Force*, 648 F. Supp. 2d 95 (D.D.C. 2009) (same); *MCI Worldcomm, Inc. v. General Services Admin.*, 163 F. Supp. 2d 28 (D.D.C. 2001) (same). Its failure to do so underscores the improper nature of its claim here.

Moreover, Petitioner's failure to avail itself of the APA is no reason to permit it to challenge disclosure under the standard Congress provided *only to the Government*

when it seeks to withhold information under FOIA. *See* 5 U.S.C. § 552(b)(4) (exempting information from disclosure where government can show it is "obtained from a person" and "confidential or privileged"). To permit Petitioner to do so would allow private parties to avoid the standard applicable to APA challenges, which sets aside government action only if it is "arbitrary and capricious" or otherwise not in accordance with law, 5 U.S.C. § 706(2). The Court should reject Petitioner's attempt to work around Congress's express intent and four decades of precedent requiring disclosure challenges to be made through the APA.

B. Permitting private petitioners to place themselves in the shoes of the Government when the Government itself has abandoned an appeal would undermine FOIA's mandate.

Accepting jurisdiction over Petitioner's claim would do violence to FOIA and its overarching mandate of public disclosure. As this Court recognized in *Chrysler*, FOIA and its legislative history make clear that Congress never intended private entities to have veto power over government decisions to release information to the public. *Chrysler*, 411 U.S. at 291–93. Congress intentionally did not create a private cause of action to mandate secrecy under FOIA. *See* 5 U.S.C. § 552; *see Brown*, 441 U.S. at 291–92; SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 6 (July 4, 1966), *available at* http://www.llsdc.org/assets/sourcebook/foia-lh.pdf (FOIA's exemptions "were not intended by Congress to be used either to prohibit disclosure of information or to justify automatic withholding of information").

Accordingly, private entities, and even the courts, have no grounds under FOIA to second-guess statutorily conferred government decisions that favor transparency. That is true, even where, as here, the Government has changed its position acceding to disclosure (U.S. Br. at 34). This statement cannot provide the intervening Petitioner with standing, much less cure the Government's failure to appeal. Indeed, such a posture was rejected more than thirty years ago in *Diamond*, 476 U.S. at 62–64.

Lacking a private right of action to compel government secrecy in service of its particular commercial interests, the Petitioner presents itself to this Court as if it is the Government. The Petitioner cannot stand in the shoes of the Government, assert FOIA exemptions statutorily available only to the Government, and interfere with the balance Congress sought to strike between the public and their elected representatives regarding the transparency appropriate in our democracy. In the end, Article III reinforces this limitation on the judicial role. *See Steel Co.*, 523 U.S. at 101 ("The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibrium of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.").

To undermine this clear and unquestioned principle where federal agencies depend on private actors to implement policy would shield a wide array of government activity from public view, contrary to FOIA's "basic purpose" of "open[ing] agency action to the light of public scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976) (internal citation and quotation omitted).

See also P.L. 94-409 (S 5), PL 94-409, Sept. 13 1976, 90 Stat. 1271("It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government"). As Exemption 4 itself contemplates, agency action that relies upon private contractors and entities to implement government policy is not outside of FOIA's reach.

Indeed, the reality of government collaboration with private contractors only heightens the need for strict adherence to Congress's approach to government transparency in FOIA. As traditional government functions, including incarceration and detention, are increasingly implemented by private contractors, allowing private parties to exercise a non-statutory veto power over government disclosure decisions under FOIA would irrevocably damage citizens' ability to see "what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (internal citation and quotation omitted).

Finally, Petitioner's post-judgment intervention and despite its lack of standing ultimately disrupts and delays the production of information that is of great value to the public—in contravention of FOIA. Delay is antithetical to the "FOIA's goal of prompt disclosure of information." *Stonehill v. I.R.S.*, 558 F.3d 534, 539 (D.C. Cir. 2009).

Opening the door for well-resourced private entities to appeal district court disclosure orders after the Government declines to do so would impose enormous costs on FOIA requestors and delay the release of information to the public for years, even if such appeals lose on the

merits. Such a result is antithetical to FOIA, a statute with "constitutional resonance" in light of its powerful role in ensuring democratic accountability. *See* Eric M. Freedman, *Commentary, Freedom of Information and the First Amendment in a Bureaucratic Age*, 49 BROOK. L. REV. 835, 837 (1983).

Allowing intervenors to step into the shoes of the Government where the Government has acceded to a judgment and waived its right to appeal will also likely have unexpected consequences beyond the FOIA context. Weakened jurisdictional restraints could invite a broad array of claims by private actors who seek to disrupt and challenge government decision-making outside of appropriate litigation channels. The Court's Article III precedents prevent this undesirable result.

Petitioner has presented no compelling reason to reject decades of precedent and Congress's express mandates.

CONCLUSION

The Petitioner lacks standing to appeal the Government's statutorily conferred and irrevocable decision to disclose documents under FOIA and its legally conclusive decision to forego an appeal of the district court's decision that Petitioner disagrees with. Accepting jurisdiction over Petitioner's claim will frustrate the Congressional purpose underlying FOIA and set the stage for hiding any government activity touching private collaboration from public view. The Court should vacate the decision of the Court of Appeals and remand for dismissal.

Respectfully submitted,

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March 25, 2019